

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CINDY ELLEN OCHOA, an
individual,

NO. 2:18-CV-0297-TOR

Plaintiff,

V.

SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL
775, an unincorporated labor
association, *et al.*,

**ORDER GRANTING DEFENDANT
PUBLIC CONSULTING GROUP,
INC.'S MOTION TO DISMISS AND
PUBLIC PARTNERSHIPS LLC'S
MOTION TO DISMISS**

Defendants.

14 BEFORE THE COURT is Defendant Public Consulting Group, Inc.’s
15 Motion to Dismiss (ECF No. 19), and Defendant Public Partnerships LLC’s
16 Motion to Dismiss (ECF No. 20). The Motions were submitted for consideration
17 with oral argument. The Court held a hearing on April 9, 2019 in Spokane,
18 Washington. The Court has reviewed the record and files herein, and is fully
19 informed. For the reasons discussed below, the Motions (ECF Nos. 19; 20) are
20 **granted.**

ORDER GRANTING DEFENDANT PUBLIC CONSULTING GROUP, INC.'S MOTION TO DISMISS AND PUBLIC PARTNERSHIPS LLC'S MOTION TO DISMISS ~ 1

BACKGROUND

The instant suit involves alleged wrongful withholding of union dues from Plaintiff Cindy Ellen Ochoa’s wages. Ochoa is an “Individual Provider” (“IP”) who provides “in-home health care services to her disabled son, under RCW 74.39A.” ECF No. 1 at 2, ¶ 3. As an IP, Ochoa is employed by Governor Jay Inslee (the “State”) and is “classified as a public employee for collective bargaining purposes under RCW 41.56.” ECF No. 1 at 2-3, ¶ 3.

8 Defendants Public Partnerships LLC (“PPL”) and Public Consulting Group,
9 Inc. (“PCG”) (collectively, “Public”¹) provide payroll services to the State², which
10 include processing the payment of wages and related withholdings and deductions
11 for IPs. ECF No. 1 at 4, ¶ 9, 7, ¶ 19; *see* ECF No. 19 at 2. As part of a collective
12 bargaining agreement between the State and Service Employees International
Union, Local 1775 (“SEIU 1775”), the State agreed to Public’s obligation to provide
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¹ Generally, the distinction between PPL and PCG is not material to resolution of these motions to dismiss.

17 ² Plaintiff asserts both PPL and PCG provide the services under contract with
18 Washington Department of Social and Health Services (“DSHS”). PCG asserts
19 they are not a party to the contract. This dispute is not material to resolution of
20 these motions to dismiss.

1 the IP's wages and remit the funds to SEIU 775. ECF No. 1 at 3, ¶ 4. Apparently,
2 the State "relies entirely" on SEIU 775 for determining from whom dues should be
3 withdrawn and SEIU 775 directly provides the information to Public, who
4 processes the information accordingly. ECF No. 1 at 13, ¶¶ 52-53, 19, ¶ 79; *see*
5 ECF No. 36 at 19-20, ¶ 64 (clarifying Public receives a "deduction order [] from
6 the union").

7 When Ochoa first began working as an IP in 2012, union dues were
8 automatically deducted from every IP's pay. *See* ECF No. 1 at 7, ¶ 21. However,
9 in 2014, the Supreme Court in *Harris v. Quinn*, 573 U.S. 616, 648-49 (2014)
10 recognized non-union member IPs cannot be compelled to pay union dues. In light
11 of this, Ochoa objected to the withdrawal of dues in July 2014; the withdrawals
12 stopped at that time. ECF No. 1 at 7, ¶ 22. Ochoa does not complain about these
13 initial withdrawals.

14 **1. First alleged violation: 2016-2017 withdrawals**

15 In October 2016 "Defendants began withdrawing union dues" from her pay,
16 but "Ochoa only noticed this ten months later, in March 2017." ECF No. 1 at 8, ¶
17 30. "As soon as [] Ochoa noticed the withdrawals, she began contacting SEIU 775
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1 to have it stop.” ECF No. 1 at 8, ¶ 31.³ Ochoa “was first directed to a customer
2 service line” and “[t]he woman [Ochoa] spoke with told [her] that SEIU 775 was
3 withdrawing union dues from [her] salary because [she] had signed a union
4 membership card.” ECF No. 1 at 8, ¶ 31. “Ochoa informed the woman that she
5 had not, and demanded that she be shown the card.” ECF No. 1 at 8, ¶ 31. “SEIU
6 775 eventually sent [Ochoa] a copy of the electronic signature and card that [she]
7 had allegedly signed, dated May 28, 2016.” ECF No. 1 at 8, ¶ 32.

8 “Ochoa immediately recognized that the signature was not her own [and]
9 again contacted SEIU 775 and demanded that they stop withdrawing dues from her
10 salary, and remit the amount taken from her.” ECF No. 1 at 8, ¶ 33. “In June
11 2017, and after many attempts to have Defendants stop withdrawing dues from her,
12 Adam Glickman, secretary treasurer of SEIU 775, sent Ms. Ochoa a letter”
13 recognizing the electronic signature dated May 28, 2016 did not match her
14 signature. Included with the letter was a check made out to Ms. Ochoa for
15 \$358.94. A month later, in July 2017, SEIU 775 sent a second letter to Ms. Ochoa,
16 for an additional \$51.12. ECF No. 1 at 9, ¶¶ 34-35. “Ochoa, through her attorney,
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18 ³ In Plaintiff’s proposed amended complaint, Ochoa alleges she spoke with
19 Public multiple times and Public employees eventually told her that she needed to
20 speak with SEIU 775 to stop the withdrawals. ECF No. 36 at 18, ¶¶ 53-59.

1 rejected the checks sent to her by SEIU 775, so she could pursue her legal
2 options.” ECF No. 1 at 11, ¶ 42. “From this point union dues stopped.” ECF No.
3 1 at 9, ¶ 35.

4 Ochoa asserts a representative from SEIU 775 forged her signature. ECF
5 No. 1 at 2, ¶ 1. Ochoa recalls that, “[o]n May 28, 2016, an SEIU 775
6 representative named ‘Vera’ arrived on [her] porch at her home.” ECF No. 1 at 7,
7 ¶ 24. “Vera presented Ms. Ochoa with an iPad and told [her] that [she] needed to
8 sign the iPad to verify [her] contact information.” ECF No. 1 at 7, ¶ 25. Ochoa
9 declined the request, but Vera “insisted” Ochoa sign. ECF No. 1 at 8, ¶¶ 26-27.
10 “When Ms. Ochoa refused to sign, Vera became angry and walked away.” ECF
11 No. 1 at 8, ¶ 28. “As Vera walk away from the porch, Ms. Ochoa could see that
12 Vera was writing something on the iPad. Ms. Ochoa yelled to Vera ‘do not change
13 my info!’” ECF No. 1 at 8, ¶ 29.

14 **2. Second alleged violation: 2018 withdrawal**

15 Ochoa alleges that “[l]ess than a year after temporarily ceasing diverting Ms.
16 Ochoa’s wages to SEIU 775, Defendants again, in July 2018, began withdrawing
17 dues from Ms. Ochoa’s wages.” ECF No. 1 at 11, ¶ 43. According to Ochoa,
18 “Defendants withdrew dues from [her] salary for July and August 2018 [and] have
19 not fully refunded the monies taken from her.” ECF No. 1 at 11, ¶ 45. “As a
20 consequence, Ms. Ochoa again had to contact SEIU 775 representatives numerous

1 times to stop withdrawing dues from her wages.” ECF No. 1 at 11, ¶ 43. Ochoa
2 does not allege any facts related to what gave rise to these withdrawals.

3 **3. Procedural history**

4 Ochoa brought this suit on September 24, 2018 against SEIU 775, PCG,
5 PPL, Cheryl Strange, in her capacity as secretary of the DHS, and Jay Inslee, in
6 his capacity as Governor of the State of Washington. ECF No. 1 at 1. In “Count I”
7 and “Count II”, Ochoa alleges “Defendants violated [her] First Amendment rights
8 when it withdrew union dues absent her consent” in 2016-2017 and 2018,
9 respectively, and seeks damages under 42 U.S.C. § 1983 and costs and attorney’s
10 fees under 42 U.S.C. § 1988. ECF No. 1 at 12 (heading; emphasis removed); 15, ¶
11 56. In “Count III”, Ochoa requests a “declaratory judgment that Defendants
12 violated her First Amendment rights by withdrawing union dues without her
13 consent” and seeks “proper relief, to include [an] injunction[.]” ECF No. 1 at 16, ¶
14 63. In Count IV, Ochoa alleges that “Defendants failed to provide minimal
15 procedural due process to protect Ms. Ochoa’s rights” and seeks damages under 42
16 U.S.C. § 1983 and costs and attorney’s fees under 42 U.S.C. § 1988. ECF No. 1 at
17 17 (heading; emphasis removed), 18, ¶ 76. In “Count V”, Ochoa requests
18 “declaratory and injunctive relief declaring that the dues withdrawal procedure . . .
19 fails to meet minimum procedural safeguard requirements to protect [Ochoa’s
20 rights] . . . and ordering Defendants to cease abiding by such procedure.” ECF No.

1 at 19, ¶ 82. In “Count VI”, Ochoa “seeks declaratory judgment that Defendants
2 violated her First Amendment rights by failing to employ and abide by procedural
3 due process safeguards protecting her rights” and “other further necessary or
4 proper relief[.]” ECF No. 1 at 20, ¶¶ 86, 89. In “Count VII”, Ochoa alleges SEIU
5 775 is liable for the tort of outrage when it forged Ochoa’s signature in order to
6 wrongful procure union dues. ECF No. 1 at 20 (heading). In Count “VIII”, Ochoa
7 asserts “Defendants willfully withheld wages und RCW 49.52.050[.]” ECF No. 1
8 at 23 (heading; emphasis removed).

9 PCG and PPL brought nearly identical motions to dismiss (ECF Nos. 19;
10 20). Ochoa opposes the Motions. ECF No. 28. Defendants Cheryl Strange and
11 Jay Inslee do not object to the Motions. ECF No. 27. These Motions are now
12 before the Court.

13 **STANDARD OF REVIEW**

14 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may
15 move to dismiss the complaint for “failure to state a claim upon which relief can be
16 granted.” “The burden of demonstrating that no claim has been stated is upon the
17 movant.” *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

18 A motion to dismiss for failure to state a claim will be denied if the plaintiff
19 alleges “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
20 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*

1 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding, the Court may
2 consider the plaintiff’s allegations and any “documents incorporated into the
3 complaint by reference . . .” *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*,
4 540 F.3d 1049, 1061 (9th Cir. 2008) (citation omitted). While the plaintiff’s
5 “allegations of material fact are taken as true and construed in the light most
6 favorable to the plaintiff[,]” the plaintiff cannot rely on “conclusory allegations of
7 law and unwarranted inferences [] to defeat a motion to dismiss for failure to state
8 a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996) (citation
9 and brackets omitted). That is, the plaintiff must provide “more than labels and
10 conclusions, and a formulaic recitation of the elements.” *Twombly*, 550 U.S. at
11 555.

12 **DISCUSSION**

13 Defendants PPL and PCG submitted separate, but very similar, motions to
14 dismiss requesting the Court dismiss all of Ochoa’s claims against them. PPL and
15 PCG argue Ochoa has failed to allege a plausible claim against PPL and PCG
16 under 42 U.S.C. § 1983 and under RCW 49.52.070. The Court agrees.

17 **A. RCW 49.52.070**

18 Ochoa alleges that “Defendant State, in concert with the other Defendants,
19 willfully withheld wages from Cindy Ochoa when it withheld union dues from her
20 wages without authorization.” ECF No. 1 at 23, ¶ 100. Specifically, Ochoa asserts

1 that Public is liable for unlawful wage withholdings under RCW 49.52.050. ECF
2 No. 228 at 19-20. Public argues Ochoa's state claim fails because Ochoa did not
3 allege facts suggesting Public *willfully* withheld wages. ECF No. 19 at 11-13; 20
4 at 11-13. Public is correct.

5 Pursuant to RCW 49.52.050(2), “[a]ny employer or officer, vice principal or
6 agent of any employer . . . who . . . [w]illfully and with intent to deprive the
7 employee of any part of his or her wages . . . pay any employee a lower wage” than
8 he or she is entitled to is “guilty of a misdemeanor.” RCW 49.52.050. Said actors
9 are also subject to civil liability “for twice the amount of the wages unlawfully . . .
10 withheld . . . , together with costs of suit and a reasonable sum for attorney’s
11 fees[.]” RCW 49.52.070. “Under RCW 49.52.050(2), a nonpayment of wages is
12 willful when it is not a matter of mere carelessness, but the result of knowing and
13 intentional action.” *Ebling v. Gove’s Cove, Inc.*, 34 Wash. App. 495, 500 (1983)
14 (citation omitted). The actor’s “genuine belief that he is not obligated to pay
15 certain wages precludes the withholding of wages from falling within the operation
16 of RCW 49.52.050(2) and 49.52.070.” *Id.* (citation omitted).

17 Here, Ochoa concedes in her Complaint that Public “relied on SEIU 775
18 and/or the State and DSHS to determine which individuals consented to waive
19 their First Amendment rights, without requiring any corroboration or verification
20 that individuals waived those rights by clear and convincing evidence.” ECF No. 1

1 at 13, ¶ 53. Ochoa does not allege facts suggesting Public had the intent to deprive
2 Ochoa of her pay, nor does Ochoa allege any facts suggesting Public did not have a
3 good faith belief that it was obligated to withhold wages pursuant to its contract
4 with – and the directions of – the State.⁴ Rather, based on Ochoa’s own Complaint
5 (ECF No. 1), Public merely cut checks based on the information provided to them
6 in accordance with the directions of the State. As such, Ochoa has failed to state a
7 claim against Public based under RCW 49.52.070. *Ebling*, 34 Wash. App. at 500.

8 **B. 42 U.S.C. § 1983**

9 Ochoa argues that because Public, in fact, (1) withdrew union dues without
10 Ochoa’s consent, *see* ECF No. 28 at 5-6, and (2) rely on the State or SEIU 775 to
11 determine whether union dues should be withdrawn (without independently
12 verifying such), ECF No. 28 at 6-12, Public is liable under 42 U.S.C. § 1983 (and
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14 ⁴ In reference to the 2016-2017 violations, Ochoa argues that “[d]espite [her]
15 repeated attempts to make [Public] stop, it took [Public] 10 months to stop the dues
16 deductions.” ECF No. 28 at 3. This contradicts Ochoa’s other allegations. Ochoa
17 stated in her complaint that she *became aware* of the deductions in May 2017
18 (after 10 months of dues had been withdrawn) and that the withdrawals stopped in
19 June or July of 2017 after SEIU 775 recognized the alleged forgery. ECF No. 1 at
20 8, ¶ 30, 9, ¶ 34. This leaves one or two months of a potential delay.

1 42 U.S.C. § 1988 based on their presumed 1983 claim), ECF No. 28 at 12-19. This
2 grossly oversimplifies the requirements of articulating a Section 1983 action.

3 Title 42 U.S.C. § 1983 provides in relevant part:

4 Every person who, under color of any statute, ordinance, regulation, custom,
5 or usage, of any State . . . subjects, or causes to be subjected, any citizen of
6 the United States or other person within the jurisdiction thereof to the
7 deprivation of any rights, privileges, or immunities secured by the
8 Constitution and laws, shall be liable to the party injured in an action at law,
9 suit in equity, or other proper proceeding for redress . . .”

10 “The terms of § 1983 make plain two elements that are necessary for recovery.”

11 *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). “First, the plaintiff must
12 prove that the defendant has deprived him of a right secured by the ‘Constitution
13 and laws’ of the United States.” *Id.* “Second, the plaintiff must show that the
14 defendant deprived him of this constitutional right ‘under color of any statute,
15 ordinance, regulation, custom, or usage, of any State or Territory.’” *Id.*

16 42 U.S.C. 1983 applies to “[e]very person who subjects, or causes to be
17 subjected, any citizen . . . to the deprivation of any rights . . . secured by the
18 Constitution and laws . . .” By the plain language, a party is only liable under
19 Section 1983 for “their *own* illegal acts”; there is no vicarious liability. *Connick v.*
20 *Thompson*, 563 U.S. 51, 60 (2011) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469,
479 (1986)). This requires more than establishing the actor is a “but-for” cause of
the constitutional violation. *See Bd. of Cty. Comm’rs of Bryan Cty., Okl. v. Brown*,

1 520 U.S. 397, 410 (1997). “In order for a private individual to be liable for a §
2 1983 violation when a state actor commits the challenged conduct, the plaintiff
3 must establish that the private individual was the proximate cause of the
4 violations.” *Franklin*, 312 F.3d at 445 (citation omitted). “[A]bsent some showing
5 that a private party had some control over state officials’ decision [to commit the
6 challenged act], the private party did not proximately cause the injuries stemming
7 from [the act].” *Id.* at 446 (brackets in original) (quoting *King v. Massarweh*, 782
8 F.2d 825, 829 (9th Cir. 1986)).

9 Among other deficiencies, the Court finds Plaintiff has not alleged facts
10 suggesting Public was the proximate cause of the alleged constitutional
11 deprivations. Even assuming Public acted under color of law in providing payroll
12 services under a contract with the State – a dubious proposition that would convert
13 every contractor into a state actor – Public was merely an instrument of the alleged
14 deprivation that was caused by the State and/or SEIU 775.

15 Here, Ochoa complains that the 2016-2017 violations occurred as a result of
16 a forgery and Public’s alleged failure to verify the information provided by SEIU
17 775. Ochoa does not allege any facts regarding the 2018 violation. Ochoa misses
18 the forest for the trees in determining who actually caused the alleged
19 constitutional violations. Public did not forge Ochoa’s signature—an agent of
20 SEIU 775 purportedly did. Public did not establish the mechanism for processing

1 the information—the State (or DSHS) did. The State is Ochoa’s employer. The
2 State hired Public – a private company – to provide payroll services. The State
3 determined from whom Public would receive the necessary information. And,
4 ultimately, it was the State that withheld the funds by directing Public to process
5 information as provided by SEIU 775. While Public was the instrument in
6 directing payments, the complained of conduct is attributable to the State and/or
7 SEIU 775, not Public. *See Mendez v. Cty. of Los Angeles*, 897 F.3d 1067, 1074
8 (9th Cir. 2018) (“we must first determine *what act or omission constituted the*
9 *breach of duty*, and then ask whether that act or omission was the but-for *and*
10 *proximate cause* of the plaintiff’s injuries” (emphasis own)); *Craine v. Oliver*
11 *Chilled Plow Works*, 280 F. 954, 957 (9th Cir. 1922) (“The causes that are merely
12 incidental or instruments of a superior or controlling agency are not
13 the proximate causes and the responsible ones, though they may be nearer in time
14 to the result. It is only when the causes are independent of each other that the
15 nearest is, of course, to be charged with the disaster.” (quoting *Aetna Ins. Co. v.*
16 *Boon*, 95 U.S. 117, 130 (1877))).

17 Notably, Ochoa has failed to provide any case law demonstrating liability in
18 similar circumstances, nor has Ochoa provided any case law demonstrating private
19 payroll services must independently investigate the veracity of the information or
20 otherwise implement procedures to ferret out forgeries and other incorrect

1 information. It appears to be the State's responsibility to pay its employees their
2 fair wages; it is not Public's responsibility to ensure the State is providing proper
3 information, at least where the State did not specifically assign such responsibility
4 to Public.

5 Accordingly, the Court finds Ochoa has failed to state a claim against Public
6 because the facts, as alleged, demonstrate Public was not the proximate cause of
7 Ochoa's alleged constitutional deprivations. Plaintiff's constitutional claims –
8 along with the related requests for declaratory actions – must be dismissed.

9 **C. Leave to Amend**

10 The Ninth Circuit has repeatedly held that "a district court should grant
11 leave to amend even if no request to amend the pleading was made, unless it
12 determines that the pleading could not possibly be cured by the allegation of other
13 facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). The
14 standard for granting leave to amend is generous.

15 Here, Plaintiff has also sought leave to amend within the time constraints of
16 the Court's Scheduling Order, ECF No. 36, yet briefing on the motion has not been
17 completed. Because the Court cannot categorically rule out the possibility that
18 amendment could cure the defects, Ochoa must be granted leave to amend the
19 Complaint. The Court also observes that the proposed First Amended Complaint,
20 ECF No. 36 at 6-41, does not cure the noted deficiencies.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant Public Consulting Group, Inc.'s Motion to Dismiss (ECF No. 19) is **GRANTED** without prejudice.
2. Defendant Public Partnerships LLC's Motion to Dismiss (ECF No. 20) is **GRANTED** without prejudice.
3. Plaintiff may submit a First Amended Complaint within **twenty (20) days** of the date of this Order.
4. Plaintiff's Motion for Leave to File Amended Complaint, ECF No. 36, is **DENIED** as moot.

The District Court Executive is directed to enter this Order and furnish copies to the parties.

DATED April 15, 2019.



Thomas O Rice
THOMAS O. RICE
Chief United States District Judge

ORDER GRANTING DEFENDANT PUBLIC CONSULTING GROUP, INC.'S MOTION TO DISMISS AND PUBLIC PARTNERSHIPS LLC'S MOTION TO DISMISS ~ 15